

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

REYNALDO AGAVO,
Petitioner,
v.
DWIGHT NEVEN, et al.
Respondents.

2:13-cv-01741-JCM-CWH
ORDER

On September 23, 2015, this court granted petitioner’s motion for a stay and abeyance and administratively closed the matter pending petitioner’s exhaustion of his remedies in state court. On July 28, 2017, petitioner moved to reopen on the grounds that the Nevada Supreme Court had on June 13, 2017 issued remittitur on his appeal of the denial of his post-conviction petition. (ECF No. 45). Good cause appearing, this action will be reopened, and a further briefing schedule will be set.

Petitioner has also filed a motion for leave to file a second amended petition. (ECF No. 47). No opposition to the petitioner has been filed, and the time for doing so has expired.

Absent prejudice to the opposing party, bad faith, dilatory motive, futility, or undue delay, leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a); *United States ex. rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001). Petitioner seeks to amend his petition to incorporate his most recent state court proceedings and amend Ground 7 to include legal arguments that were made to the state court during those proceedings. The court concludes that none of the factors the court must consider

1 weighs against allowing leave to amend the petition in this instance. Accordingly, the motion
2 for leave to file a second amended petition will be granted.

3 IT IS THEREFORE ORDERED that petitioner's motion to reopen this action (ECF
4 No. 45) is GRANTED.

5 IT IS FURTHER ORDERED that, as the stay is lifted by this order, the Clerk shall
6 REOPEN THE FILE in this action.

7 IT IS FURTHER ORDERED that petitioner's motion for leave to file a second amended
8 petition (ECF No. 47) is GRANTED. Petitioner shall file his second amended petition within
9 ten days of the date of this order.

10 IT IS FURTHER ORDERED that respondents shall have sixty (60) days following
11 service of the second amended petition within which to answer, or otherwise respond to, the
12 second amended petition.

13 IT IS FURTHER ORDERED that petitioner shall have sixty days following service of the
14 answer to file and serve a reply brief. If a dispositive motion is filed, the parties shall brief the
15 motion in accordance with Local Rule 7-2.

16 IT IS FURTHER ORDERED that any procedural defenses raised by respondents to the
17 counseled amended petition shall be raised together in a single consolidated motion to
18 dismiss. Procedural defenses omitted from such motion to dismiss will be subject to potential
19 waiver. Respondents shall not file a response in this case that consolidates their procedural
20 defenses, if any, with their response on the merits, except pursuant to 28 U.S.C. § 2254(b)(2)
21 as to any unexhausted claims clearly lacking merit. If respondents do seek dismissal of
22 unexhausted claims under § 2254(b)(2): (a) they shall do so within the single motion to dismiss
23 not in the answer; and (b) they shall specifically direct their argument to the standard for
24 dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir.
25 2005). In short, no procedural defenses, including exhaustion, shall be included with the merits
26 in an answer. All procedural defenses, including exhaustion, instead must be raised by motion
27 to dismiss.

28 IT IS FURTHER ORDERED that, in any answer filed on the merits, respondents shall

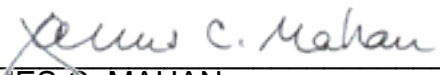
1 specifically cite to and address the applicable state court written decision and state court
2 record materials, if any, regarding each claim within the response as to that claim.

3 IT IS FURTHER ORDERED that any state court record and related exhibits filed herein
4 by either petitioner or respondents shall be filed with a separate index of exhibits identifying
5 the exhibits by number. The CM/ECF attachments that are filed further shall be identified by
6 the number or numbers of the exhibits in the attachment. If the exhibits filed will span more
7 than one ECF Number in the record, the first document under each successive ECF Number
8 shall be either another copy of the index, a volume cover page, or some other document
9 serving as a filler, so that each exhibit under the ECF Number thereafter will be listed under
10 an attachment number (i.e., Attachment 1, 2, etc.).

11 IT IS FURTHER ORDERED that the hard copy of any exhibits filed by either counsel
12 shall be delivered – for this case – to the Reno Clerk's Office, 400 S. Virginia St., Reno, NV,
13 89501, and directed to the attention of "Staff Attorney" on the outside of the mailing address
14 label.

15 IT IS SO ORDERED.

16 DATED: January 23, 2018.

17 
18 JAMES C. MAHAN
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28